140-137

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 303.

JEROME F. MANNING, PLAINTIFF IN ERROR,

vs.

HENRY AMY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED NOVEMBER 25, 1887.

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1 To the Honorable Horace Gray, associate justice of the Supreme Court of the United States:

Jerome F. Manning, of Lowell, in the county of Middlesex and State and district of Massachusetts, respectfully represents that he was the defendant in a certain action of contract lately pending in the superior court in and for the county of Suffolk, in said State and district of Massachusetts, in which Henry Amy, of the city, county, and State of New York, was plaintiff, and in which judgment was entered for said plaintiff against said defendant on the twenty-third day of May now last past, for the sum of twenty-nine thousand three hundred thirty-five dollars and thirty-seven cents; that in the trial of said action and in the rendition of judgment therein was involved the decision of a Federal question, to wit, the construction of section 639 of the Revised Statutes of the United States, and the decision thereof was against the claim of said defendant; and that said judgment is final, the same being the judgment of the highest court in said State and district of Massachusetts having jurisdiction of the subject-matter thereof. Wherefore said Manning prays said justice to allow a writ of error to issue, to bring said cause before the
2 Supreme Court of the United States.

JEROME F. MANNING,
By CHARLES COWLEY,
His Attorney.

[Seal the Superior Court.]

3 UNITED STATES OF AMERICA, *ss:*

Seal of the Circuit Court, Massachusetts.

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had, and in which court the record remained, in the suit between Henry Amy, of the city, county, and State of New York, *is* plaintiff, and Jerome F. Manning, of Lowell, in the county of Middlesex and Commonwealth of Massachusetts, *is* defendant, in a plea of contract, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right,

privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said ——— ———, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the first day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
HORACE GRAY,
Justice of the Supreme Court of the United States.

4 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

And now here the judges of the superior court in and for said county make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court *court*, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal the Superior Court.

In testimony whereof I, Jos. A. Willard, clerk of said superior court, have hereto set my hand and the seal of said court this fifteenth day of September, A. D. 1887.

JOS. A. WILLARD, *Clerk.*

5 The United States of America to the Commonwealth of Massachusetts, to Henry Amy, of the city, county, and State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the superior court of the Commonwealth of Massachusetts, wherein Jerome F. Manning is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ

of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Horace Gray, justice of the Supreme Court of the United States, this ninth day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

HORACE GRAY,
Associate Jus. Sup. Court of the U. S.

Service of the above citation is hereby acknowledged.

HENRY AMY,
By his att'y, CHARLES A. PRINCE.

6 Supreme Court of the United States.

JEROME F. MANNING, Plaintiff in Error,
vs.
HENRY AMY, Defendant in Error.

Assignment of Errors.

And now comes the plaintiff in error and for an assignment of errors in the above-entitled cause assigns the following, viz:

First. It was error in the superior court to continue the case *nisi* on December 29th, 1884, for the purpose of giving that court an opportunity to hear and determine the motion to dismiss and the plea in abatement or for any other purpose, although the court did so, expressly "reserving the defendant's right to remove."

Second. The plaintiff below being a citizen of New York and the defendant a citizen of Massachusetts and the matter in dispute and for which *and for which* the suit was brought exceeding the sum of five hundred dollars, exclusive of costs, and the defendant having during the return term filed a proper petition and a bond with sureties for the removal of the action to the circuit court of the United States for the district of Massachusetts, and all these facts appearing of record, the superior court had no lawful authority to proceed with the case after the filing of said petition and bond, unless and until the circuit court should remand the same as improperly removed.

Third. The jurisdiction of the superior court was at an end when the defendant's counsel, at the January sitting, 1886, called the court's attention to the steps taken by him for the removal of the action to said circuit court and objected to a trial of the action in that court (as stated in the bill of exceptions), and it was error in

7 the superior court to rule "that the right to remove was waived" and to proceed to try the case in that court, and this error is the more palpable from the fact that the defendant's right to remove had theretofore been expressly reserved by that court.

JEROME F. MANNING,
By CHARLES COWLEY,
His Attorney.

8 COMMONWEALTH OF MASSACHUSETTS:

[Seal the Superior Court.]

I, Lincoln F. Brigham, chief justice of the superior court of the Commonwealth of Massachusetts, do certify that Jos. A. Willard, Esq., whose signature is affixed to the papers hereunto annexed, is clerk of said superior court within and for the county of Suffolk, and hath the keeping of the files, records, and proceedings of said court within and for said county; also of the late court of common pleas within and for said county and of the late superior court of the county of Suffolk aforesaid; that he is, by law, the proper person to make out and to certify copies of the files, records, and proceedings of said several courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestations to the papers hereunto annexed, being numbered 1 to 125, inclusive, of the files, records, and proceedings of the said superior court, is in due form.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed this fourth day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

9 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our superior court for the said county of Suffolk it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To the sheriffs of our several counties or their deputies, Greeting:

[L. S.] We command you to attach the goods or estate of Jerome F. Manning, having his usual place of business in Boston, in said county, to the value of sixty thousand dollars, and summon the said defendant (if he may be found in your precinct) to
10 appear before our justices of our superior court, next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of October next, then and there in our said court to answer unto Henry Amy, of the city, county, and State of New York, in an action of contract.

1st count. And the plaintiff says that the defendant made a promissory note payable to the order of the plaintiff, a copy whereof is annexed to this declaration, marked "A;" and the defendant owes the plaintiff the amount of said note and interest thereon from the seventeenth day of October, 1883, at which date payment of said note was demanded by said plaintiff from said defendant.

2d count. And the plaintiff says that the defendant made a certain other promissory note payable to the order of the plaintiff, a copy whereof is annexed to this declaration, marked "B;" and
11 the defendant owes the plaintiff the amount of said note, with interest thereon.

3rd count. And the plaintiff says that the defendant made a certain other promissory note payable to the order of the plaintiff, a copy whereof is annexed to this declaration, marked "C;" and the defendant owes the plaintiff the amount of said note, with interest thereon.

4th count. And the plaintiff says that the defendant made a certain other promissory note payable to the order of the plaintiff, a copy whereof is annexed to this declaration, marked "D;" and the defendant owes the plaintiff the amount of said note, with interest thereon.

By his attorneys, PRINCE & PEABODY.

"A."

$6,250$\frac{00}{100}$. BOSTON, MASS., *Oct.* 14, 1882.

One year after date I promise to pay to the order of Henry Amy, Esq're, sixty-two hundred & fifty dollars $\frac{00}{100}$, at my office, in
12 this city, 131 Devonshire St., value received, with the current rate of exchange on New York.

No. —.

Due October 14–17, '83.

J. F. MANNING.

Endorsed: H. Amy.

"B."

$6,225. BOSTON, MASS., *Nov.* 25, 1882.

One year after date I promise to pay to the order of Henry Amy six thousand two hundred & twenty-five dollars, at my office, in said Boston.

Value received.

Due —.

J. F. MANNING.

"C."

$4,000$\frac{00}{100}$. BOSTON, *Jan'y* 5, 1883.

One year after date I promise to pay to the order of H. Amy, Esq're, four thousand dollars $\frac{00}{100}$, with interest at 6% p. annum, at 131 Devonshire Str., Boston.

13 Value received.

Due Jan'y 8, '84.

J. F. MANNING.

"D."

$7,000$\frac{00}{100}$. BOSTON, *January* 19*th*, 1883.

One year after date I promise to pay to the order of H. Amy, Esq're, seven thousand $\frac{00}{100}$ dollars $\frac{}{100}$, with interest at 6 % p. a., value received, payable at No. 131 Devonshire Str., Boston.

Due Jan'y 22, '84.

J. F. MANNING.

To the damage of the said plaintiff (as he says) the sum of sixty thousand dollars, which shall then and there be made to appear, with other due damages; and whereas the said plaintiff says that the said defendant has not in his own hands and possessions goods and estate to the value of sixty thousand dollars aforesaid which can be come at to be attached, but has intrusted to and deposited in the hands and possession of James Littlefield, Leonard Ware, Andrew Wil-
14 liams, Freeman S. Lurten, all of Boston, in said county, and Everett Fowler, Mary A. Fowler, both of Salisbury, Essex county, in said State; Reuben Freeman, Elisha S. Burch, Joseph M. Caton, Herman Smith, Francis Joseph Correa, William H. Newcomb, Elisha M. Dyer, Charles A. Hannum, Robert C. Soper, David P. Cook, Samuel F. Soper, Joshua Paine, & Francis Williams, all of Provincetown; William O. Harris, of Plymouth; Manuel Jones, of Barnstable, in the county of Barnstable, trustees of the said defendant's goods, effects, and credits, to the said value:

We command you, therefore, that you summon the said supposed trustees (if they may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any they have, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against defendant's goods, effects, or credits in the hands and possession of the said trustees;
15 and have you there this writ with your doings therein.

Witness Lincoln Flagg Brigham, Esquire, at Boston, the fifth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

JOS. A. WILLARD, *Clerk*.

On which said writ are the following returns by the officers who served the same:

SUFFOLK, *ss:*

BOSTON, *September* 6*th*, 1884.

By virtue of this writ I, this day, at 20 minutes past 1 o'clock p. m., summoned the within-named Everett Fowler, and on the same day, at 2 o'clock p. m., I summoned the within-named Freeman S. Lurten, and on the 8th day of said September, at 10 minutes past 9 o'clock a. m., I summoned the within-named Leonard Ware, and on the same day, at 4 p. m., I summoned the within-named
16 Andrew Williams, and on the 9th day of said September, at 30 minutes past 9 o'clock a. m., I summoned the within-named

James Littlefield, all to appear and show cause at court, as within directed, by delivering to each in hand an attested copy of this writ.

FRED. H. SEAVEY,
Deputy Sheriff.

Service & travel	2 90
Copies	5 00
	$7 90

BARNSTABLE, *ss:*

PROVINCETOWN, *Sept. 10th*, 1884.

By virtue of this writ I this day summoned the within-named trustees, to wit, Reuben Freeman, Joseph M. Caton, Francis Joseph Correa, Elisha S. Burch, William H. Newcomb, Charles A. Hannum, Joshua Paine, Francis Williams, for their appearance at court, as within directed, by giving in hand to each and all of them a true and attested copy of this writ, and on the same 10th day of September I summoned the within-named Robert C. Soper for his appearance as within directed by leaving a true and attested copy
17 of this writ at his last and usual place of abode in Provincetown.

I have made diligent search for the within-named trustees, Elisha M. Dyer, Heman Smith, David P. Cook, and Samuel F. Soper, but cannot find them within my precinct, neither can I find any last and usual place of abode.

JOSEPH WHITCOMB,
Deputy Sheriff.

Officer's fees:

9 copies	4 50
9 services	4 50
Travel	3 50
	$12 50

On said first Tuesday of October, 1884, the plaintiff appeared and, by his attorneys, entered the above action on said trustees, Mary A. Fowler and William O. Harris. There was no service of plaintiff's writ; and it was ordered by the court as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court. October Term, A. D. 1884.

HENRY AMY, of the City, County, and State of New York, Pl'ff,

vs.

18 JEROME F. MANNING, Having His Usual Place of Business in Boston, in the County of Suffolk, Def't, and James Littlefield, Leonard Ware, Andrew Williams, Freeman S. Lurten, All of said Boston; Everett Fowler, Mary A. Fowler, Both of Salisbury, Essex County, in said State; Reuben Freeman, Elisha S. Burch, Joseph M. Caton, Herman Smith, Francis Joseph Correa, William H. Newcomb, Elisha M. Dyer, Charles A. Hannum, Robert C. Soper, David P. Cook, Samuel F. Soper, Joshua Paine, and Francis Williams, All of Provincetown; William O. Harris, of Plymouth; Manuel Jones, of Barnstable, in the County of Barnstable, Trustees.

This is an action of contract to recover sixty thousand dollars alleged to be due to the plaintiff from the defendant on the fifth day of September, 1884, as set forth in the plaintiff's writ of that date.

And it appearing to the court by the suggestion of the pl'ff and on inspection of the officer's return on the plaintiff's writ
19-25 that no personal service of said writ has been made upon the defendant—

It is ordered by the court here that the plaintiff give notice to the defendant of the pendency of this action by serving him with a true and attested copy of this order fourteen days, at least, before the fourth Monday of October, A. D. 1884, that he may then and there appear and show cause why judgment in the above-entitled action should not be rendered against him, and that this action be continued to the next term of the court, and so from term to term until notice shall have been given to the defendant agreeably to this order.

JOS. A. WILLARD, *Clerk.*

26–29 * * * * * * *

And said order was returned into this court with the following thereon, to wit:

SUFFOLK, *ss:*

BOSTON, *October 9th*, 1884.

I this day served the within order of court on the within-named Jerome F. Manning to appear and answer at court, as within directed, by delivering to him in hand an attested copy thereof.

JOHN B. FITZPATRICK,
Deputy Sheriff.

Fees:

Service	50
Copy	58
Travel	00
	$1 08

Filed October 10, 1884.

30 * * * * * * *

The following was filed:

31 In the case of Henry Amy *v.* Jerome F. Manning & Tr. please enter my appearance for the principal def't specially.

CHAS. COWLEY,
12 *Middle St., Lowell, Mass.*

1136.
Filed October 14, '84.

* * * * * * *

32 And the following was filed:

SUFFOLK, *ss:*

Superior Court. Oct. Term, 1884.

HENRY AMY, Pl'ff,
v.
J. F. MANNING, D'f't.

33 In the above action I appear for defendant "specially,"

WILBUR H. POWERS,
Att'y for —.

Filed November 6, 1884.

The defendant filed the following, to wit:

SUFFOLK, *ss:*

Superior Court. October Term, 1884.

HENRY AMY
v.
JEROME F. MANNING and Tr.

And now comes the defendant and suggests to the court that prior to the entry of the plaintiff's writ in this case no service thereof was made or attempted to be made upon the principal defendant, who is distinctly described therein as having his place of residence in Lowell and one of his usual places of business in Boston.

And he further suggests that after the service of this writ upon divers of the defendant trustees, to wit, on the sixteenth day of
34 September last past, he demanded of the plaintiff's attorneys a copy of the plaintiff's declaration and bill of particulars, the same not having been inserted in the writ, by a demand in

writing, a copy whereof is hereto annexed, and that one of the plaintiff's attorneys, Mr. Prince, promised the defendant, in answer to said demand, to furnish such copy, but that no copy thereof has been furnished in compliance with said demand, which is by law a discontinuance of the action.

Wherefore he moves the court to order that this action be discontinued and dismissed.

JEROME F. MANNING,
By C. COWLEY, *His Attorney.*

J. F. Manning, attorney and counsellor at law.

BOSTON, *Sept. 16th*, 1884.

Messrs. Prince & Peabody, Boston, attorneys for Henry Amy, of the city, county, and State of New York.

35 SIRS: I hereby demand of you a true and correct copy of the declaration and bill of particulars of any demand or demands you may have against me as said attorneys of the said Henry Amy.

Please deliver the same to the bearer, Mr. A. Erlund, forthwith upon delivery of this demand, or have it sent by you to me in person to my office, room 12, 131 Devonshire St., city of Boston, county of Suffolk, Commonwealth of Massachusetts.

Yours respectfully,
(Signed) JEROME F. MANNING.

Filed October 22, 1884.

SUFFOLK, *ss:*

Superior Court.

HENRY AMY
vs.
JEROME F. MANNING.

Motion to Dismiss.

Wilbur H. Powers, attorney.

And now comes the defendant, by his said attorney, and moves said honorable court to enter an order to dismiss the above-entitled action for the following reasons, to wit:

36 Because said defendant was not served with said writ or summoned thereon or any lawful process made upon said defendant, in accordance with the provisions of the statute in such cases made and provided, nor was any service of said writ or any summons thereon made upon any agent or attorney of the said defendant.

For which reasons and any others that may hereafter appear the above-entitled action should be dismissed.

WILBUR H. POWERS,
Attorney for said Defendant.

Filed November 6, 1884.

SUFFOLK, ss:

Superior Court.

HENRY AMY
vs.
JEROME F. MANNING.

Answer in Abatement by the said Defendant.

Wilbur H. Powers, attorney.

And now comes the said defendant, by his said attorney, and says:

1. No legal service of the writ in said action or any sum-
37 mons thereon and no legal process whatever upon said writ has been made upon the said defendant, and that this appears by the return of the officer upon the original writ; and, further, that a certain special precept issued by order of the court in term time purporting to be a summons upon the said defendant, upon which precept the return of the officer as to service thereon was not in anywise a legal service, but is wholly void, the same order of service having been made without authority of law; for which reasons and any others that may hereafter appear the said defendant ought not to be held to answer to the plaintiff's writ, but the same should be abated and quashed.

2. And the said defendant further says that said special precept or order of notice addressed to the said defendant was not in accordance with the provisions of the statute as to orders of notice or supplemental service, which provides that an order of notice or
38 service can only be lawfully had where there has been some kind of lawful service or an attempt at some lawful service upon the defendant, but that the said order of notice or service could only be had lawfully in cases where there has been a defective or insufficient service of the writ on the defendant, and cannot possibly apply to this case where no return whatsoever upon the original writ of service or any attempt thereat upon the defendant has been made by the officer. For this reason the said defendant ought not to be held to answer to the plaintiff's writ, but the same should be abated and quashed.

3. And the said defendant further says that it appears by the return of the officer upon said writ that there was an attachment of property by the service of a trustee process, and this was an attachment of property within the meaning of chapter 167, sections 8 and 9, of the Public Statutes.

39 And the defendant further says that no declaration was inserted in the writ at the time said attachment was made by the service of the trustee process, but that the defendant demanded in writing of the attorneys for said plaintiff a copy of the declaration and bill of particulars in said cause (a copy of said demand is hereto annexed, marked "A"), and the said demand was made in accordance with law, but that the attorneys for the said plaintiff did not comply with the same, and no copy of the said declaration and

bill of particulars or either of them was furnished in response to said demand, to which the said defendant was entitled in accordance with the statutes in such cases made and provided.

And therefore, for these reasons, the said defendant ought not to be held to answer to the plaintiff's writ, but that the same should be abated and quashed.

(Signed) WILBUR H. POWERS,
Attorney for said Defendant.

40 & 41 EXHIBIT "A."

BOSTON, *Sept. 16th*, 1884.

Messrs. Prince & Peabody, Boston, attorneys for Henry Amy, of the city, county, and State of New York.

SIRS: I hereby demand of you a true and correct copy of the declaration and bill of particulars of any demand or demands you may have against me as said attorneys of the said Henry Amy.

Please deliver the same to the bearer, Mr. A. Erlund, forthwith upon delivery of this demand, or have it sent by you to me in person to my office, room 12, 131 Devonshire St., city of Boston, county of Suffolk, Commonwealth of Massachusetts.

Yours respectfully,
(Signed) JEROME F. MANNING.

Filed November 6, 1884.

* * * * * * *

42 And the plaintiff filed the following, to wit:

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk*, } *ss:*

Superior Court. October Term.

HENRY AMY
v.
JEROME F. MANNING & TR'S.

Plaintiff's Motion to Disallow and Dismiss Defendant's Plea in Abatement and Motion to Dismiss.

43 And now comes the plaintiff in the above-entitled case and moves the court to disallow and dismiss defendant's plea in abatement and the motion to dismiss the plaintiff's action filed by Wilbur H. Powers, Esq.

By his attorneys, PRINCE AND PEABODY.

Filed December 22, 1884.

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk,* } *ss:*

Superior Court. October Term, 1884.

HENRY AMY
v.
JEROME F. MANNING & TR'S.

The plaintiff in this — claims a jury trial.
By his attorneys, PRINCE & PEABODY.

Filed December 26, 1884.

44 SUFFOLK, *ss:*

Superior Court. October Term, 1884.

HENRY AMY
vs.
JEROME F. MANNING and TRUSTEES.

Defendant's Answer.

The defendant, being ordered by the court to file an answer in the above-entitled action, now comes and for answer says:

1. That he does not waive his motion to dismiss, filed Nov. 6th, 1884, and that he makes this answer without prejudice to the same.

2. That he does not waive his plea in abatement, filed Nov. 6th, 1884, but makes the same a part of his answer.

3. That he denies each and every allegation, statement, and particular in the plaintiff's writ and declaration contained, except as hereinafter specifically admitted.

4. And, further answering, the defendant admits that he signed the notes mentioned in the 1st and 2nd counts of plaintiff's declaration, but says that he signed both of said notes under the following circumstances: The plaintiff agreed to loan the defendant sums of money at various times amounting, in all, to $20,000, and not to call upon the defendant to pay the same until all the judgments of the Court of Commissioners of Alabama Claims were paid by the United States; and in consideration therefor the defendant,
45 being able to use said sums of money to great advantage and with great profit to himself in prosecuting the claims against the United States in the said Court of Commissioners of Alabama Claims, agreed to pay the plaintiff 25 per cent. interest upon all sums so loaned him for the first year and 6 per cent. interest per annum thereafter until said notes were paid in full, and said contract was made in New York, where the plaintiff resides and the defendant then had and now has a usual place of business; and on or about the time stated in the notes annexed to the 1st and 2nd counts of the plaintiff's declaration the plaintiff loaned the defendant certain sums of money, much less than the sums of money mentioned in said notes. The defendant says that he in fact received 75 per

cent. of the face of said notes in both cases, and that 25 per cent. of the face of said notes was retained by the plaintiff as interest for the first year; that both of said notes were made in the city, county, and State of New York, and the money was loaned by the plaintiff and received by the defendant in said city of New York, and that each of the said notes was falsely and fraudulently dated by the plaintiff or by the direction of the plaintiff at Boston, Mass., and made payable at said Boston, and that the dating of said notes at Bos-
46 ton, Mass., and making the same payable at the said Boston was a device of the plaintiff to evade the law of New York and to avoid the penalties of the laws of New York against usury and usurious contracts, and was in fraud of the law of New York, and by said device to make it appear that the taking of an excessive rate of interest was lawful. The defendant says that the United States have not paid all the judgments in the Court of Commissioners of Alabama Claims, and have not paid any of the judgments in the so-called class 2 cases, and, as the law now provides, will not for more than a year next ensuing. The defendant says that both of said notes are without consideration and are void, and the defendant says that the plaintiff at said New York loaned money upon said notes to the defendant, taking and reserving from said loans a greater sum or greater value than is prescribed by the law of the State of New York, to wit, a greater sum or greater value than $6 upon $100 for one year, and after that rate for a greater or less sum or for a longer or shorter time; and the defendant further says that the said taking or reserving from said loans of a greater sum or greater value than $6 upon $100 for one year, and after that rate for a greater or less sum or for a longer or shorter time, according to the laws of the State of New York, renders said notes and all the contracts in
47 relation to said loans void, and renders said notes void in the hands of the plaintiff.

5. And, further answering, the defendant admits that he signed the notes mentioned in the 3rd and 4th counts of the plaintiff's declaration, but says that he signed the notes mentioned in said 3rd and 4th counts under the following circumstances: The plaintiff agreed to loan the defendant sums of money at various times amounting in all to $20,000, and not to call upon the defendant to pay the same until all the judgments in the Court of Commissioners of Alabama Claims were paid by the United States; and, in consideration of said agreements of the plaintiff, the defendant, being able to use said sums of money to great advantage and with great profit to himself in prosecuting claims against the United States in said Court of Commissioners of Alabama Claims, agreed to pay the plaintiff 25 per cent. interest upon all sums so loaned him by the plaintiff for the first year, and 6 per cent. interest thereafter until said loans were paid in full; and after the notes mentioned in the 1st and 2nd counts of the plaintiff's declaration were signed by the defendant the plaintiff informed the defendant that he, the plaintiff, would not be able to furnish cash to the defendant for any fur-
48 ther loans, but that he would allow the defendant to take certain 1st-mortgage bonds of the Mexican National Railway Co. be-

longing to the plaintiff, giving notes equal to the par value of the same, and sell said bonds upon the market, and thereby obtain the money required. The plaintiff stated to the defendant that he, the plaintiff, paid in cash the par value of said bonds, and that he, the plaintiff, had purchased the said bonds as an investment, and though they were then selling at about fifty per cent. of the par value, yet he believed that they would eventually be worth par; and the plaintiff gave the defendant the option of paying said notes mentioned in the 3rd and 4th counts of the plaintiff's declaration, with interest at 25 per cent. for the first year and 6 per cent. thereafter until paid in full, or of returning to him said bonds or their equivalents and paying the plaintiff 25 per cent. interest for the first year and 6 per cent. interest thereafter upon the face of said notes until the defendant replace said bonds or their equivalents in the hands of the plaintiff; and the defendant says that he was induced to take said bonds and give his said notes therefor by said statement of the plaintiff that the plaintiff paid par value in lawful money for the said bonds, and the defendant is informed and believes that said statement is false and fraudulent,
49 and that the plaintiff did not pay par value in lawful money for said bonds; and the defendant says that he, the defendant, believed at that time that said bonds would greatly fall in market price, and by reason of the option or privilege of returning the plaintiff the said bonds or their equivalents granted by the plaintiff he was induced to sign the notes mentioned in the 3rd and 4th counts of the plaintiff's declaration, and refused to sign them unless he had said option or privilege; and the defendant says that both of said notes mentioned in the 3rd and 4th counts of plaintiff's declaration were made and delivered in the city, county, and State of New York, and the said bonds were delivered to defendant by the plaintiff in the said city of New York; and the defendant says that the said notes are without consideration and are void, and that the plaintiff is not entitled to recover thereon, and that the United States have not paid all the judgments in the Court of Commissioners of Alabama Claims and have not paid any judgment in the so-called class 2 cases; and the defendant says that both of said notes and the signatures thereto were obtained by the plaintiff from the defendant through fraud and are void; and, further answering, the defendant says that the defendant at said New
50 York loaned money upon the notes mentioned in the 3rd and 4th counts of the plaintiff's declaration to the defendant, taking and reserving from said loans a greater sum or greater value than is prescribed by the law of the State of New York, to wit, a greater sum or greater value than $6 upon $100 for the first year, and after that rate for a greater or less sum or for a longer or shorter time; and the defendant further says that the said taking or reserving from said loan of a greater sum or greater value than $6 upon $100 for one year, and after that rate for a greater or less sum or for a longer or shorter time, according to the laws of the State of New York, renders said loans and all the contracts in relation to said loans void, and renders said notes void in the hands of the plaintiff.

6. And the defendant further says said action was prematurely brought.

7. And the defendant further says that the contract under which the notes mentioned in the 1st and 2nd counts of the plaintiff's declaration were made, and of which said notes form a part, and which contract is fully set out in defendant's answer No. 4, is unconscionable, and that said notes and all of the contracts connected with said loans are void.

51 8. And the defendant says that the contract under which the notes mentioned in the 3rd and 4th counts of the plaintiff's declaration were made, and of which said notes formed a part, and which contract is fully set out in defendant's answer No. 5, is unconscionable, and that said notes and all of the contracts connected with said loans are void.

JEROME F. MANNING,
By his att'y, WILBUR H. POWERS.

Filed Dec. 26, 1884.

SUFFOLK, *ss:*

Superior Court. October Term, 1884.

HENRY AMY
vs.
JEROME F. MANNING.

Claim of Jury Trial.

And now comes the defendant in the above-entitled action and claims a trial by jury.

JEROME F. MANNING,
By his att'y, WILBUR H. POWERS.

Filed Dec. 26, 1884.

52 And on the twenty-ninth day of said December the defendant filed the following, to wit:

SUFFOLK, *ss:*

Superior Court. October Term, 1884.

HENRY AMY
vs.
JEROME F. MANNING and TRUSTEES.

Defendant's Motion Touching the Removal of this Action.

And now comes the defendant specially and suggests to the court that he has heretofore filed a motion to dismiss this action for causes therein set forth and also a plea in abatement for causes therein set forth, but neither said motion nor said plea has yet been heard or determined by this court, and the court is about to adjourn without day.

He also suggests that he has herewith filed a petition for the removal of this cause to the circuit court of the United States for the district of Massachusetts, together with a suitable bond therefor, but that he has filed the same without prejudice to said motion or said plea.

Wherefore, in case said motion should not be allowed and in case said plea should not be sustained, he prays the court to order the removal of this action, as prayed for in said petition.

JEROME F. MANNING,
By his att'y, WILBUR H. POWERS.

53 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Superior Court. Boston, Dec. 27th, 1884.

HENRY AMY
vs.
JEROME F. MANNING and TRUSTEES.

The petition of Jerome F. Manning, the above-named defendant, shows to the court that the above suit was begun against him in the superior court, Commonwealth of Massachusetts, on or about the fifth day of September, 1884; that at the time said suit was begun and at the present time the plaintiff was and is a citizen and resident of the State of New York, and the defendant was and is a citizen and resident of the Commonwealth of Massachusetts; that the matter in dispute in said suit and for which said suit is brought exceeds the sum of $5,000, exclusive of costs, and the defendant herewith files a bond, with good and sufficient sureties, for his entering in the circuit court of the United States for the first district of Massachusetts, wherein said suit is pending, on the first day of the next session of said court, a copy of the record in said suit, and for paying all costs that may be awarded by said court if said court shall hold that such suit was wrongfully or improperly removed thereto, as provided by a statute of the United States. Wherefore the defendant prays this honorable court that said bond may be approved and said suit may be removed into the circuit court of the United States for the first district of Massachusetts, and that this court proceed no further in the premises.

(Signed) JEROME F. MANNING, *Petitioner.*

54 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Jerome F. Manning, being duly sworn, says that he is the def't in the above-entitled action, and has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge.

Sworn to before me this 27th day of December, A. D. 1884.
JOHN B. FOLGER,
Notary Public.

Filed Dec. 29, 1884.

Know all men by these presents that we, Jerome F. Manning, of the city of Lowell, county of Middlesex, Commonwealth of Massachusetts, and Nancy Manning, of said Lowell, and John B. Folger, of Medford, county and State as aforesaid, are jointly and severally held and firmly bonded unto Henry Amy in the penal sum of $500.00; for which, well and truly to be paid unto the said H. Amy, his heirs, executors, assigns, and administrators, we bind ourselves, our heirs, executors, assigns, and administrators, firmly by these presents.

Sealed with our seal- this twenty-ninth day of December, A. D. 1884.

The condition of this obligation is such that if the said Jerome F. Manning, the defendant in a suit now pending in the superior court in the county of Suffolk, in said Commonwealth of Massachusetts, shall, on the first day of the next session or term of the circuit court of the United States for the first district of Massachusetts, enter a copy of the record in said suit, and shall enter the appearance
55 of said Jerome F. Manning in said circuit court of the United States and pay all costs that may be awarded against him by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed from said State court, then this application to void, but otherwise to remain in full force and effect.

In witness whereof the said obligors have hereunto set their hands and seals this 29th day of December, A. D. 1884.

JEROME F. MANNING. [SEAL.]
CHRISTINA MANNING. [SEAL.]
NANCY MANNING. [SEAL.]
JOHN B. FOLGER. [SEAL.]

Filed Dec. 29th, 1884.

Thence the same was continued *nisi* to the January term, 1885, the defendant reserving his right to remove to the circuit court of the United States as aforesaid; and at a hearing on the third day of March, in the year last aforesaid, the defendant's motion to dismiss and plea in abatement were overruled. Thereupon the defendant filed the following, to wit:

SUFFOLK, *ss:*

Superior Court.

HENRY AMY
vs.
JEROME F. MANNING.

Statement of Facts.

The writ is as follows:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* *ss:*

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Jerome F. Manning, having his usual place of business in Boston, in said
56 county, to the value of sixty thousand dollars and summon the said defendant (if he may be found in your precinct) to appear before our justices of our superior court, next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of October next, then and there, in our said court, to answer unto Henry Amy, of the city, county, and State of New York, in an action of contract to the damage of the said plaintiff (as he says) the sum of sixty thousand dollars, which shall then and there be made to appear, with other due damages; and whereas the said plaintiff says that the said defendant has not in his own hands and possession goods and estate to the value of sixty thousand dollars aforesaid, which can be come at to be attached, but has entrusted to and deposited in the hands and possession of James Littlefield, Leonard Ware, Andrew Williams, Freeman S. Lenten, all of said Boston, in said county; and Everett Fowler, Mary A. Fowler, both of Salisbury, Essex county, in said State; Reuben Freeman, Elisha L. Burch, Joseph M. Caton, Herman Smith, Francis Joseph Correa, William H. Newcomb, Elisha M. Dyer, Charles H. Hannum, Robert C. Soper, David P. Cook, Samuel F. Soper, Joshua Paine, and Francis Williams, all of Provincetown; William O. Harris, of Plymouth; Manuel Jones, of Barnstable, in the county of Barnstable, trustees of the said defendant's goods, effects, and credits to the said value, we command you, therefore, that you summon the said supposed trustees (if they may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any they have, why executions, to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any), should not issue against defendant's goods, effects, or credits in the hands and possession of the said trustees.

57 And have you there this writ with your doings therein.

Witness Lincoln Flagg Brigham, Esquire, at said Boston,

the fifth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

JOS. A. WILLARD, *Clerk.*

The following return appears upon the writ:

SUFFOLK, *ss:*

BOSTON, *September 6th*, 1884.

By virtue of this writ I this day, at 20 minutes past 1 o'clock p. m., summoned the within-named Everett Fowler, and on the same day, at two o'clock p. m., I summoned the within-named Freeman S. Lenten, and on the eighth day of said September, at 10 minutes past 9 o'clock a. m., I summoned the within-named Andrew Williams, and on the 9th day of September, at 30 minutes past 9 o'clock a. m., I summoned the within-named James Littlefield, all to appear and show cause at court, as within directed, by delivering to each in hand an attested copy of this writ.

FRED. H. SEAVEY,
Deputy Sheriff.

And no returns whatever is made by the officer in regard to the defendant. An order of notice by personal service was issued in this case after the commencement of the term to which said writ was made returnable, as follows:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court. October Term, A. D. 1884.

HENRY AMY, of the City, County, and State of New York, Pl'ff,
vs.
JEROME F. MANNING, Having His Usual Place of Business in Boston, in the County of Suffolk, Def't, and James Littlefield, Leonard Ware, Andrew Williams, Freeman S. Luther, all of said Boston; Everett Fowler, Mary A. Fowler, both of Salisbury, Essex County, in said State; Reuben Freeman, Elisha S. Burch, Joseph M. Eaton, Herman Smith, Francis Joseph Correa, William H. Newcomb, Elisha M. Dyer, Charles A. Hannum, Robert C. Soper, David P. Cook, Samuel F. Soper, Joshua Paine, and Francis Williams, all of Provincetown; William O. Harris, of Plymouth; Manuel Jones, of Barnstable, in the County of Barnstable, Trustees.

58

This is an action of contract to recover sixty thousand dollars, alleged to be due to the plaintiff from the defendant on the fifth day of September, 1884, as set forth in the plaintiff's writ of that date; and it appearing to the court by the suggestion of the plaintiff and on inspection of the officer's return on the plaintiff's writ that no personal service of said writ has been made upon the defendant—

It is ordered by the court here that the plaintiff give notice to

the defendant of the pendency of this action by serving him with a true and attested copy of this order fourteen days at least before the fourth Monday of October, A. D. 1884, that he may then and there appear and show cause why judgment in the above-entitled action should not be rendered against him, and that this action be continued to the next term of court, and so from term to term until notice shall have been given to the defendant agreeably to this order.

JOS. A. WILLARD, *Clerk.*

The following return appears upon said precept or order:

SUFFOLK, *ss:*

OCTOBER 9TH, 1884.

I this day served the within order of court on the within-named Jerome F. Manning to appear and answer at court, as within directed, by delivering to him in hand an attested copy thereof.

JOHN B. FITZPATRICK,
Deputy Sheriff.

59 November sixth, 1884, the defendant appeared specially by his att'y, Wilbur H. Powers, and on November sixth, 1884, filed the following motions to dismiss:

Motion to Dismiss.

SUFFOLK, *ss:*

Superior Court.

And now comes the defendant, by his said attorney, and moves said honorable court to enter an order to dismiss the above-entitled action for the following reasons, to wit: Because said defendant was not served with said writ or summons therein or any lawful process made upon said defendant in accordance with the provisions of the statute in such cases made and provided, nor was any service of said writ or any summons thereon made upon any agent or attorney of the said defendant; for which reasons and any others that may hereafter appear the above-entitled action should be dismissed.

WILBUR H. POWERS,
Att'y for Def't.

The motion was heard in the third session of the superior court and all of the foregoing facts appeared of record in the case. The court overruled the motion to dismiss, and the defendant, feeling aggrieved, appeals.

Filed March 9, 1885.

JEROME F. MANNING,
By his att'y, WILBUR H. POWERS.

60 SUFFOLK, ss:

Superior Court.

HENRY AMY
vs.
JEROME F. MANNING.

Appeal of defendant from decision overruling answer in abatement.

Statement of Facts.

The writ is as follows:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, ss:

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Jerome F. Manning, having his usual place of business in Boston, in said county, to the value of sixty thousand dollars, and summon the said defendant (if he may be found in your precinct) to appear before our justices of our superior court, next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of October next, then and there, in our said court, to answer unto Henry Amy, of the city, county, and State of New York, in an action of contract to the damage of the said plaintiff (as he says) the sum of sixty thousand dollars, which shall then and there be made to appear, with other damages; and whereas the said plaintiff says that the said defendant has not in his own hands and possession goods and estate to the value of sixty thousand dollars aforesaid which can be come at to be attached, but has entrusted to and deposited in the hands and possession of James Littlefield, Leonard Ware, Andrew Williams, Freeman S. Lenten, all of said Boston, in said county, and Everett Fowler, Mary A. Fowler, both of Salisbury, Essex county, in said State; Reuben Freeman, Elisha L. Burch, Joseph M. Caton, Herman Smith, Francis Joseph Correa, William H. Newcomb, Elisha M. Dyer, Charles
61 A. Hannum, Robert C. Soper, David P. Cook, Samuel F. Soper, Joshua Paine, and Francis Williams, all of Provincetown; William O. Harris, of Plymouth; Manuel Jones, of Barnstable, trustees of the said defendant's goods, effects, and credits to the said value, we command you, therefor-, that you summon the said supposed trustees (if they may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any they have, why execution, to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any), should not issue against said defendant's goods, effects, or credits in the hands and possession of the said trustees; and have you there this writ with your doings thereon.

Witness Lincoln Flagg Brigham, Esquire, at said Boston, the fifth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

JOS. A. WILLARD, *Clerk.*

The following return appears upon the writ:

SUFFOLK, *ss:*

BOSTON, *September 6th*, 1884.

By virtue of this writ I this day, at 20 minutes past 1 o'clock p. m., summoned the within-named Everett Fowler, and on the same day, at two o'clock p. m., I summoned the within-named Freeman S. Lenten, and on the eighth day of said September, at 10 minutes past nine o'clock a. m., I summoned the within-named Andrew Williams, and on the ninth day of said September, at 30 minutes past 9 o'clock a. m., I summoned the within-named James Littlefield, all to appear and show cause at court, as within directed, by delivering to each in hand an attested copy of this writ.

FRED. H. SEAVEY,
Deputy Sheriff.

62 And no return whatever is made by the officer in regard to the defendant. An order of personal notice was issued in this case after the commencement of the term to which said writ was made returnable as follows:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court. Oct. Term, A. D. 1884.

HENRY AMY, of the City, County, and State of New York, Plaintiff,

vs.

JEROME F. MANNING, Having His Usual Place of Business in Boston, in the County of Suffolk, Def't, and James Littlefield, Leonard Ware, Andrew Williams, Freeman S. Luther, all of said Boston; Everett Fowler, Mary A. Fowler, Both of Salisbury, in Essex County, in said State; Reuben Freeman, Elisha S. Burch, Joseph M. Eaton, Herman Smith, Francis Joseph Correa, William H. Newcomb, Elisha M. Dyer, Charles A. Hannum, Robert C. Soper, David P. Cook, Samuel F. Soper, Joshua Paine, and Francis Williams, all of Provincetown; William O. Harris, of Plymouth; Manuel Jones, of Barnstable, in the County of Barnstable, Trustees.

This is an action of contract to recover sixty thousand dollars alleged to be due to the plaintiff from the defendant on the fifth day of September, 1884, as set forth in the plaintiff's writ of that date.

And it appearing to the court by the suggestion of the plaintiff

and on the inspection of the officer's return on the plaintiff's writ that no personal service of said writ has been made upon the defendant—

It is ordered by the court here that the plaintiff give notice to the defendant of the pendency of this action by serving him
63 with a true and attested copy of this order fourteen days, at least, before the fourth Monday of October, A. D. 1884, that he may then and there appear and show cause why judgment in the above-entitled action should not be rendered against him, and that this action be continued to the next term of court, and so from term to term until notice shall have been given to the defendant agreeably to this order.

JOS. A. WILLARD, *Clerk.*

The following return appears upon said order:

SUFFOLK, *ss:*

BOSTON, *Oct. 9th*, 1884.

I this day served the within order of court on the within-named Jerome F. Manning to appear and answer at court as within directed by delivering to him in hand an attested copy thereof.

JOHN B. FITZPATRICK,
Deputy Sheriff.

November 6th, 1884, the defendant appeared specially by his attorney, Wilbur H. Powers, and on November 6th, 1884, filed the following answer in abatement:

And now comes the said defendant, by his said attorney, and says:

(1.) No legal service of the writ in said action or any summons thereon and no legal process whatever upon said writ has been made upon the said defendant, and that this appears by the return of the officer upon the original writ: and, further, that a certain special precept issued by the order of the court in term time purporting to be a summons upon the said defendant, upon which precept the return of the officer as to service thereon was not in anywise a legal service, but is wholly void, the same order of service having
64 been made without authority of law, for which reasons and any others that may hereafter appear the said defendant ought not to be held to answer to the plaintiff's writ, but the same should be abated and quashed.

(2.) And the said defendant further says that said special precept or order of notice addressed to the said defendant was not in accordance with the provisions of the statute as to order of notice or supplemental service, which provides that an order of notice or service can only be lawfully had where there has been some kind of lawful service or an attempt at some lawful service upon the defendant, but that the said order of service or notice could only be had lawfully in cases where there has been a defective or insufficient service of the writ on the defendant, and cannot possibly apply to this case,

where no return whatsoever upon the original writ of service or any attempt thereat upon the defendant has been made by the officer.

For this reason the said defendant ought not — be held to answer to the plaintiff's writ, but the same should be abated and quashed.

(3.) And the said defendant further says that it appears by the return of the officer upon said writ that there was an attachment of property by the service of an attachment of property by the service of a trustee process, and this was an attachment within the meaning of chapter 167, sections 8 and 9, of the Public Statutes; and the defendant further says that no declaration was inserted in the writ at the time said attachment was made by the service of the trustee process, but that the defendant demanded in writing of the attorneys for said plaintiff a copy of the declaration and bill of
65 particulars in said cause (a copy of said demand is hereto annexed, marked "A"), and the said demand was made in accordance with law, but that the attorney for said plaintiff did not comply with the same, and *in* copy of the said declaration or bill of particulars or either of them was furnished in response to the said demand, to which the said defendant was entitled in accordance with the statute in such cases made and provided; and therefore for these reasons the said defendant ought not to be held to answer to the plaintiff's writ, but that the same should be abated and quashed.

WILBUR H. POWERS,
Att'y for said Def't.

EXHIBIT "A."

BOSTON, *Sept.* 16*th*, 1884.

Messrs. Prince and Peabody, Boston, attorneys for Henry Amy, of the city, county, and State of New York:

SIRS: I hereby demand of you a true and correct copy of the declaration and bill of particulars of any demand or demands you may have against me as said attorneys of the said Henry Amy. Please deliver the same to the bearer, Mr. A. Erlund, forthwith upon delivery of this demand, or have it sent by you to me in person to my office, room 12, 131 Devonshire St., city of Boston, county of Suffolk, Commonwealth of Massachusetts.

Yours respectfully, JEROME F. MANNING.

The said answer in abatement was argued in the third session of the superior court, and it appeared at the hearing that the foregoing written demand was properly served upon the attorneys for the plaintiff, and that no declaration was furnished the defend-
66–94 ant, and the remaining facts herein stated appeared of record in the case, and the answer was overruled. Wherefore the defendant, feeling aggrieved at the decision of the court, appeals therefrom.

JEROME F. MANNING,
By his att'y, WILBUR H. POWERS.

Filed March 10, 1885.

* * * * * * *

95 The following was filed:

SUFFOLK, ss:

Superior Court.

HENRY AMY
vs.
JEROME F. MANNING.

Withdrawal of Attorney.

In the above-entitled cause I hereby withdraw my name as attorney of record for Jerome F. Manning.

WILBUR H. POWERS.

Filed February 2, 1886.

And also the following was filed:

SUFFOLK, ss:

Superior Court. January Term, 1886.

HENRY AMY, Pl'ff,
v.
J. F. MANNING, D'f't.

In the above action I appear for the defendant, J. F. Manning.

CHAS. COWLEY,
12 *Middle St., Lowell, Mass.*

Filed February 8, 1886.

And on the eleventh day of said February the plaintiff filed the following, to wit:

96 COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk*, ss:

January Sittings, 1886.

HENRY AMY, Pet.,
v.
JEROME F. MANNING, Def't.

Petition for Writ of Protection.

Respectfully represents your petitioner, Henry Amy, of the city, county, & State of New York, that he is the plaintiff in the above-entitled action, and that he and one William Amy, also of said New York, are material witnesses in the above-entitled action, which is now depending and about to be tried in said court, and that it is necessary for the ends of justice that your petitioner and said Wil-

liam Amy should be present; and that your petitioner further is informed and believes that there is danger that while in this Commonwealth, travelling to or from said court, or while in attendance thereon, he and said William Amy, or one of them, may be arrested on civil process.

Wherefore your petitioner respectfully prays that writs of protection may issue to the end that neither your petitioner nor said William Amy may be arrested on civil process, and that no service of any civil process may be made on them or either of them while travelling to or from said court or during attendance there
97 for the trial of the said action.

HENRY AMY,
WILLIAM AMY,
By their attorneys, PRINCE & PEABODY.

Thereupon, at a hearing on said eleventh day of February, said petition was allowed and writ of protection issued; and the cause, after a full hearing, was committed to a jury sworn to try the same; which said jury returned their verdict as follows, to wit:

SUFFOLK, *ss:*

Superior Court. Jan. Sitting, A. D. 1886.

AMY, Pl'f,
—
MANNING, D'f't.

The jury find for the plaintiff and assess damages in the sum of twenty-seven thousand nine hundred & fifty-eight & $\frac{38}{100}$ dollars.

THOMAS F. HUNNEWELL,
Foreman of the Jury.

Rendered February 16, 1886.

Thereupon the defendant filed the following, to wit:

98 SUFFOLK, *ss:*

Superior Court.

HENRY AMY
v.
JEROME F. MANNING and TRUSTEES.

Defendant's Motion for a New Trial.

And now comes the defendant and moves the court to set aside the verdict rendered by the jury against him in this action—

First. Because the same is against evidence and the weight of evidence.

Second. Because the same is against law and inconsistent with the instructions of the court.

Third. Because the court, having heretofore expressly reserved to

the defendant his right to remove this action to the circuit court of the United States, acted improvidently and unadvisedly in overruling the defendant's motion for such removal and in ordering the trial to proceed against the defendant's objections.

JEROME F. MANNING,
By CHARLES COWLEY,
His Attorney.

Filed February 19, 1886.

Thereupon, at a hearing on the eighth day of March, in the year last aforesaid, it was ordered by the court as follows, to wit:

99 Allowed, unless plaintiff remits from amount of the verdict the sum of ($699.24) six hundred and ninety-nine dollars and twenty-four cents.

CHARLES P. THOMPSON, *J. S. C.*

The plaintiff, on the ninth day of said March, filed the following, to wit:

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk*, } *ss:*

Superior Court.

HENRY AMY
v.
JEROME F. MANNING & TR'S.

And now comes the plaintiff in the above-entitled case and hereby remits the sum of $699.24 from the verdict.

By his attorneys, PRINCE & PEABODY.

Said motion for a new trial was overruled, and the defendant alleged exceptions to the ruling of the court in matters of law, and the same, being reduced to writing, were presented to the court and are as follows, to wit:

SUFFOLK, *ss:*

Superior Court.

HENRY AMY
v.
JEROME F. MANNING & TR'S.

100 *Defendant's Exceptions.*

This is an action of contract brought to recover the amounts of four promissory notes, amounting in all to the sum of $23,475, exclusive of interest.

The writ was sued out of this court on September 5, 1884, and returned to the October term, 1884.

On October 22, 1884, the defendant filed a motion to dismiss the suit. On November 6th, 1884, he filed a plea in abatement.

Neither the motion to dismiss nor the plea in abatement were heard or acted upon by the court (although both were set down for hearing) during the return term, nor until March 3rd, 1885, during the term then next ensuing, when both of them were overruled, but they were brought to the attention of the court on December 22nd, 1884, before the end of the return term, and defendant was ordered to file an answer by December 26th, which defendant did on that day. The plaintiff was and is a citizen of the State of New York and the defendant a citizen of the State of Massachusetts, and they are described as such in the writ. On December 29th, 1884, the last day of the return term, the defendant filed a petition, together with a bond, with sureties, for the removal of this action to the circuit court of the United States for the district of Massa-
101 chusetts on the ground that the plaintiff was and is a citizen of New York and he himself a citizen of Massachusetts, and that the matter in dispute and for which the suit was brought exceeds the sum of $500, exclusive of costs, copies of which are annexed and made a part of this bill of exceptions.

He also, on the same day, filed his motion, a copy of which is also hereto annexed, touching the removal of this action, suggesting that neither said motion to dismiss nor said plea in abatement had yet been heard or determined by the court, and that the court was then about to adjourn without day, and praying that in case said plea should not be sustained "this court would order the removal of this action, as prayed for in said petition. Thereupon said case was 'continued *nisi*' for the purpose of giving the court an opportunity to hear and determine the motion to dismiss and plea in abatement, 'reserving the defendant's right to remove.'"

On March 3rd, 1884, both the motion to dismiss and plea in abatement were overruled.

After the motion to dismiss and plea in abatement were overruled, on March 3rd, 1884, no further action was taken by the defendant in relation to the removal of the action until it was
102 reached in its order for trial at the January sitting, 1886. The case was put upon the jury-trial list for the January term, 1885, by the plaintiff, and continued upon the trial list until it was reached in its order at the January sitting, 1886.

Although the bond was filed at the October term, 1884, it had not been approved at the time the case was reached for trial. On the motion to dismiss being overruled by the court the defendant excepted and was given until the ninth day of March, 1884, to file exceptions, but he filed none.

When the case was reached for trial at the January sitting, 1886, the defendant's counsel called the court's attention to the steps taken by him to secure the removal of the action to said circuit court and asked the court to remove the same, and objected to a trial of the action in this court; but the court ruled that the request came too late, and that the right to remove was waived, and denied the request, overruled the objection, and ordered the trial to proceed, and

the trial did proceed and the jury returned a verdict for the plaintiff for $27,259.14.

The defendant, being aggrieved by said ruling, overruling, denial, and order, excepts thereto and prays that his exception may be allowed.

JEROME F. MANNING,
103–113 By CHARLES COWLEY,
His Attorney.

March 19th, 1886.
Exceptions allowed.

CHARLES P. THOMPSON,
Justice Superior Court.

Allowed and filed March 24, 1886.

And the questions of law thereby raised, to wit, by said bill of exceptions, passed to the supreme judicial court for the Commonwealth for revision.

* * * * * * *

114 Thence the action was continued in this court from sitting to sitting to the January sitting, 1887, when a rescript was sent from said supreme judicial court for the Commonwealth to this court as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Feb'y 25, 1887.

In the case of Henry Amy *vs.* Jerome F. Manning & Trustees, pending in the superior court for the county of Suffolk, ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

115 Exceptions overruled.
By the court:

GEO. W. NICHOLS, *Clerk.*

February 26, 1887.

Brief Statement of the Grounds and Reasons of the Decision.

No error appears in the exceptions.
(See opinion with reporter.)
Filed March 4, 1887.

And the defendant filed the following, to wit:

SUFFOLK, *ss*:

Superior Court. February, 1887.

HENRY AMY
vs.
JEROME F. MANNING and TRUSTEES.

Defendant Manning's Motion for a New Trial.

And now comes said defendant and suggests to the court that the four notes on which the plaintiff obtained a verdict in the above-entitled cause were four in a series of five promissory notes, all of which were delivered to the plaintiff in New York, and the consideration for each and all of which was received by the defendant (so far as any consideration was ever received by him therefor) in New York, and under the usury laws of New York each and every one of said five notes was illegal and void; and this defendant
116 further suggests that since the rendition of the verdict aforesaid the question of the validity of the fifth in said series of notes has been judicially considered, and the question of the validity of said four notes has been incidentally considered by Mr. Justice Gardner, sitting in the supreme judicial court in and for said county, at the first trial of the bill in equity, in which Edward Holmes is plaintiff and said Henry Amy, said Manning, and Quinton Corwine are defendants; that said Justice Gardner therein made the finding, a copy whereof is hereto annexed, to the effect that said fifth note was tainted with usury and void, and no appeal from that finding and no exception thereto has been taken by said Amy; that at the trial of said bill in equity said Amy and his brother, William Amy, testified touching the making of said five notes, and their testimony was reported officially by an official stenographer, whose report in full this defendant craves leave to produce at the hearing of this motion, and the following are parts thereof, viz:

Said HENRY AMY, in his direct examination, testified:

(Book 3, p. 131:) Q. Now, you please state—give the conversation in which first the question of loans of money to Mr. Manning took place, if between yourself and William Amy, your brother, or Mr. Manning.
117 A. Well, I had known from my brother that Mr. Manning was in great want of money for some time past, and had always given him to understand that there was no necessity of coming to me, because I had no money to loan. One fine day Mr. Manning was introduced to me by my brother and wanted some money. I declined to give it for the reason that I had no money to loan; that I could use my money in my business perfectly well, and I had none to spare. After further discussion—I don't know exactly what happened, but I had always in view the making of these loans; it was a matter which I assented to just as much or more for the sake of the fact that my brother was connected with Mr. Manning—

well, Mr. Manning finally stated that $5,000 would be very acceptable; in fact, that he was in great need of it; that he would pay me 25% interest. I said, "In the first place, I have nothing to do with usurious loans;" that the laws of New York didn't allow anything of the —.

(Book 3, p. 132:) When I remarked that in New York you could not loan money at 25% or anything but the 6% Mr. Manning stated that the notes made out in Boston or dated, possibly, in Boston would render the matter perfectly easy.

Said HENRY AMY, in his cross-examination, testified:

118 (Book 3, pp. 133, 134:) Q. Did you consult any other counsel about that (the usury question)?

A. No, sir; except Mr. Myer accidentally happened to come into the office, and I asked Mr. Myer—not a business proposition given to him, but I incidentally mentioned it to him: A note made out so and dated in Boston, is that legal? Yes; that is all.

Q. Mr. Myer told you that if you dated the note Boston——

A. No; I beg your pardon. I stated this was the suggestion to him; I just asked him this. He happened to come in or pass through the office.

Q. Do you remember what time that was?

A. That must have been the first note.

Q. And this note of Feb. 19th is the fifth?

A. I think so. There are only two notes that were for money given that was not in payment for sales of bonds.

Q. I propose to separate them. Q. You gave or took, rather, from Mr. Manning five notes?

A. Yes, sir.

Q. And two of them were connected in some way with the loan or sale of Mexican bonds?

A. No, sir; three.

Q. And two were not?

A. Two were not.

119 Q. And the two that were not so connected were the two first of the five?

A. Yes, sir.

WILLIAM T. AMY, in his direct examination, testified:

(Book 3, pp. 107–109:) Q. Who were present at that coversation?

A. It was between Mr. Amy and myself—Mr. Henry Amy.

Q. Did Mr. Manning request you to see him?

A. Mr. Manning was in want of money——

Q. Did he request you to see him?

A. He wanted I should try and get him some money.

Q. Now, you give that conversation that took place then.

A. With Mr. H. Amy?

Q. Yes.

A. I mentioned to Mr. Amy that we were in great want of money, and after a great deal of exertion he finally consented to let us have $5,000. He said that in his business his money was getting be-

tween twenty-five and fifty per cent.; that he didn't care to do this business at all. Whereupon I told him that I had loaned Mr. Manning—put into the business—$5,000 upon Mr. Manning's assertion that if that note was payable in Boston and dated in Boston, and it was upon the strength of that that my brother did, and this
120 conversation afterwards, when this money was advanced, was repeated in my presence by Mr. Manning to H. Amy.

Q. So that the suggestion of the form of the notes came from Mr. Manning?

(P. 108): A. Yes, sir; because we never knew anything about it.

Q. You say at that time he gave $5,000?

A. He gave $5,000.

Q. When did you next see Mr. Henry Amy for Mr. Manning with regard to a loan of money?

A. That was in November; some time in November; I don't know the date. It must have been about the 26th or 27th of November.

Q. Where did that conversation take place?

A. On or about the 26th of November, 1882, Mr. Manning was again in want of money, and asked me to try to procure some more, and with the greatest reluctance Mr. Amy again consented in order to help us along in the business—advanced again $5,000 at great sacrifice.

Q. When did you next have a conversation with Mr. Henry Amy for Mr. Manning?

A. That was about the 28th or 27th of December of the same year.

Q. 1882?

121 A. Yes; we wanted money again and Mr. Amy point blank refused; said he had no more money to lend. Seeing that I was in great distress about it, he finally, on or about the 28th, I think—yes, he told me that there was a plan that might possibly be adopted to procure the necessary funds, and that (p. 109) was this: That he had Mexican national bonds for which he paid par and which he didn't intend to sell unless the price would come up again at that price. They had greatly depreciated—to about fifty. I wrote on the 20th or about that; told him that I had a plan to suggest and if he should come to New York I could explain it to him. He came the latter part of January. I went to see him at the hotel and explained to him that Mr. Amy would give the bonds at par and he could do with them as he pleased. The next morning he came to our house. I am living with my brother. He took breakfast with us, and there it was explained.

Q. Give that conversation.

A. Mr. Manning said he wanted some money; the business was very prosperous; and my brother repeated that he could not possibly advance any money, but that he would be willing to let him have some money if he would be willing to *let him have some*
122 *money if he would be willing to* take those bonds at par. Mr. Manning agreed to the proposition and was very well satisfied, and that day he took $4,000 in bonds, and a contract was to be drawn

up. He explained his business and said that everything was in grand style. The business was good, splendid, and my brother was highly elated and pleased; and he went away and drew up the contract, and gave a note for $4,000, and gave as security the first-class claim of Mr. Foster.

Said WILLIAM T. AMY, in his cross-examination, testified:

(Book 3, p. 117:) Q. Now, you and he (Henry Amy) talked together about the rate of interest being 25% for the first year?
A. As I tell you, my brother didn't want to do it at that.
Q. He did *nt* at a very great sacrifice?
A. Indeed, he did.
Q. Could do so much better?
A. Yes, he could.

And this defendant further suggests that since this present month of February, 1887, began he discovered certain new and material evidence tending to show, and conclusively showing, that the notes declared on in this action were delivered in New York and the consideration therefor received in New York, so far as any con-
123 sideration was ever received therefor, which evidence consists of certain memoranda written by said William P. Amy, the plaintiff's brother, in New York at the time of the making of said notes or some of them, which memoranda this defendant craves leave to produce at the hearing of this motion; and this defendant had often seen William P. Amy write and knows his handwriting, and knows that said memoranda are in the handwriting of said William P. Amy, and this defendant had no knowledge of the existence of said memoranda until long after the rendition of the verdict in this action, to wit, on or about February, 1887, when he discovered said memoranda among other paper-writings in a box sent from New York to Washington, and the contents of which were unknown to this defendant until said last-mentioned day, Mr. Andreas Erlund being present when said memoranda were found by me as aforesaid.

And this defendant further suggests that since the rendition of said verdict he has discovered the fact that in a letter by said William P. Amy to this defendant written on February 20, 1883, and received by one of this defendant's clerks in his absence and never seen by this defendant, said William P. Amy made statements showing that said notes were tainted with usury, a copy of which
124 letter is hereto annexed; and this defendant craves leave to produce the original thereof at the trial of this motion.

Wherefore this defendant moves the court to grant him a new trial of this action and to set aside said verdict because of the newly-discovered evidence hereinbefore set forth.

JEROME F. MANNING.

Middlesex, 3*n*d, 1887.—Then personally appeared said Jerome F. Manning and made oath to the truth of the several statements set forth in the foregoing motion.

Before me—

CHARLES COWLEY,
Justice of the Peace.

(Private.)

NEW YORK, *Feb.* 20, 1883.

MY DEAR SIR: I acknowledge receipt of your letter of the 19th concerning the necessary papers respecting a new loan, or rather purchase, of $5,000 more of the Mexican Nat. R. R. bonds.

Upon presenting the papers to H. Amy he insisted upon my procuring (as I anticipated it in my letter to you of the 13th inst.) an agreement showing my interest in the St. Louis cases.

125 Hence my telegram of this day. On receipt of your dispatch promising to send the agreement in a day or two, Mr. Amy signed the document which belongs to you and gave me a check for $2,400—apportionate value of the bonds which are selling to-day at 49—49⅜.

Mr. H. Amy wishes me to mention that he does not care to postpone the sale of the bonds for more than a few days.

Yours truly,

WM. AMY,
P. T. O.

J. F. Manning, Esq.

P. S.—Being somewhat short of funds, I hand you herewith my bill for disbursements for the office since Jan. 20 to date, amounting to $37.08, to cover which I enclose check for your signature.

Be kind enough to return me statement, which will be posted in the check book.

WM. AMY.

Copy.

EDWARD HOLMES
v.
JEROME F. MANNING.

I find the following facts:

1. That Edward Holmes, by himself and his duly authorized agents, made an unconditional tender of the amount due Manning by his contract with Holmes and with Amy, and that Manning refused to accept the tender.

126 2. I find that Quinton Corwine is entitled to recover one-fifth of the sum of $5,502.97, to wit, the sum of $1,100.59, with interest from the time when Manning received the drafts, namely, 24th of August, 1884.

3. I find that Manning applied to Henry Amy in New York for loans of money, and that the two talked over the usurious laws of New York, wherein he resided, and that of Massachusetts, where Manning resided; that it was agreed between them that the note for $5,000 and the contract (Exhibit 20) should be made in Massachusetts, where Manning resided, and that this was not done to evade the laws of New York relative to usury, but was made in good faith between the parties. Amy agreed at first to let Manning have money if Manning would take Mexican national bonds at par. They were then selling in the market at fifty per cent. of their par

value. On the 19th of February, 1883, Manning, being in Boston, there made and signed the $5,000 note and the written contract (Exhibit No. 20) and sent the note and contract to his agent, William Amy, in New York. Manning then had an office in New York and William Amy was there engaged in business matters relating to Alabama claims with Manning and occupied the office with Manning. William Amy received the note and contract at New York February 20, 1883, as sent to him by Manning
127 from Boston and on the same day presented the contract (Exhibit No. 20) to Henry Amy, who signed the same and completed it. William Amy then requested a loan of $2,500 upon five Mexican national bonds then in the control and possession of Henry Amy and owned by him, agreeing to give the $5,000 note sent to him by Manning therefor. Henry Amy refused to give more than $2,400, saying that the bonds had declined. $2,400 was accordingly given to William Amy and the $5,000 note was given by William to Henry. The same day William deposited the $2,400 in bank in New York to the credit of Manning. William Amy was acting throughout these transactions as the authorized agent of Manning. $2,400 was the full amount ever given for the $5,000 note by Manning to Henry Amy.

I find that the transaction was governed by the laws of New York in respect to usury, and that by such laws it was usurious; that the $5,000 note was tainted with usury and therefore became void in the hands of Henry Amy, the original payee thereof, and that Henry Amy is not entitled to any portion of the sum of $5,502.97.

I find that the agreement marked Exhibit 3, made between Holmes and Henry Amy, was without consideration, and that Holmes executed the same at the earnest solicitation of Man-
128 ning; that Holmes has complied with all the terms of said agreement; that he has been unable to withhold the $5,000 or pay the same to Henry Amy, because Holmes has never come into the possession of the same or any part thereof.

I direct that out of the fund $5.502.97, now in the hands of the clerk, that $50 be paid to Holmes as counsel fees and his costs; that $1,100.59, with interest thereon from the 23rd day of August, 1884, be paid to Quinton Corwine and his costs, and that the balance, after deducting the clerk's fees, be paid over to Manning.

(Signed) WM. S. GARDINER,
J. S. J. Court.

Filed March 5, 1887.

Thence the same was continued to the present April sitting, 1887.

And now, on the fourteenth day of May, 1887, at a hearing said motion for a new trial is overruled.

* * * * * * *

129 And on the twenty-third day of May, 1887, on motion of the plaintiff and by order of court, judgment is entered therein.

It is therefore considered by the court on the said twenty-third day of May, A. D. 1887, that said Henry Amy, plaintiff as aforesaid, recover of said Jerome F. Manning, defendant as aforesaid, the sum of twenty-nine thousand three hundred thirty-five dollars and thirty-seven cents, damages and costs of suit, taxed at ninety-five dollars and twenty-two cents.

And execution is awarded for the same sums against the goods, effects, and credits of said defendant Manning in the hands and possession of said Leonard Ware and Robert C. Soper, trustees as aforesaid.

130 & 131 It is further considered by the court on said twenty-third day of May, 1887, that said Lurten, trustee, recover of said Amy his costs of suit, taxed at five dollars and fifty-eight cents.

And it is further considered by the court on said twenty-third day of May that said Littlefield, trustee, recover of said Amy his costs of suit, taxed at sixteen dollars and twenty-four cents.

And it is further considered by the court on said twenty-third day of May that said Andrew Williams, trustee, recover of said Amy his costs of suit, taxed at ten dollars and ninety-one cents.

And it is further considered by the court on said twenty-third day of May that said Freeman, Burch, Caton, Correa, Newcomb, Paine, Francis Williams, and Jones, trustees, recover of said Amy their costs of suit, severally taxed at twenty-three dollars and seventeen cents.

And it is further considered by the court on said twenty-third day of May that said Hannum, trustee, recover of said Amy his costs of suit, taxed at seven dollars and ninety cents.

Execution issued in favor of said Henry Amy against said Jerome F. Manning May twenty-fourth, 1887.

* * * * * * *

132 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said superior court to be hereto affixed.

Witness Lincoln Flagg Brigham, Esquire, chief justice of our said superior court, at Boston, in said county of Suffolk, this first day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

JOS. A. WILLARD, *Clerk.*

[Seal the Superior Court.]

133 Supreme Court of the United States.

JEROME F. MANNING, Plaintiff in Error,
vs.
HENRY AMY, Defendant in Error.
} Number 303. October Term, 1890.

It is hereby stipulated and agreed by and between Jerome F. Manning, plaintiff in error, appearing in person, and Theodore F. H. Meyer, attorney of record for Henry Amy, defendant in error, that such papers as are contained in the authenticated transcript of the record in the aforesaid cause, filed in the office of the clerk of the said supreme court, and relate to parties summoned as trustees for Jerome F. Manning, the principal defendant in the court below; the service upon them, their appearances and answers, interrogatories propounded to them and their answers thereto, shall be omitted in the printing of the said record for the use of the said court and of counsel.

Dated March 16, 1891.

THEODORE F. H. MEYER,
For Henry Amy, Defendant in Error.
JEROME F. MANNING,
Pl'ff in Error, Pro Se.

March 17, 1890.

[Endorsed:] Supreme Court U. S. 1890, October term. No. 303. Jerome F. Manning, pl'ff in error, *v.* Henry Amy. Stipulation to omit parts of record in printing.

[Stamped:] Office Supreme Court U. S. Filed Mar. 19, 1891. James H. McKenney, clerk.

Endorsed on cover: Massachusetts superior court. No. 303. Jerome F. Manning, plaintiff in error, *vs.* Henry Amy. Filed November 25, 1887.

Office Supreme Court U. S.
FILED.
APR 18 1891
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

JEROME F. MANNING,
Plaintiff in Error,

vs.

HENRY AMY,
Defendant in Error.

Number 303.

Argued April 14, 1891.

Regarding plaintiff's supplemental brief, filed by permission of the Court, it is submitted respecting his several propositions:

1. It is not disputed that informalities or defects in the petition and bond for removal may be waived and can be amended; but in this case they were neither waived nor amended. They could not be waived without Amy's consent, and the proceedings were without notice to him. Amy could, therefore, avail of them whenever he became aware of their existence.

2. There is not in this case even a scintilla of evidence in the record or any suggestion in defendant in error's brief, to the effect that Manning's motion to dismiss and plea had any bearing whatever on the removal or affected Manning's right to remove. Amy's objection is not based on that ground.— Manning's attempt to draw a

distinction between his own acts and the acts of his attorneys is frivolous.

3. The plaintiff in error begs the question. He assumes that his proceedings had the effect of removing the cause, while the question in this case is whether or not they had that effect.

4. It is untrue that there was any contest in the Superior Court about the jurisdictional facts. There is nothing in the record to show that Amy traversed any fact alleged in the petition for removal, and in reality there was no such contest. There was a contest, but it was confined to the question of law whether the facts being admitted, Manning's proceedings, had the effect he then claimed and now claims for them.

5. The proposition is undoubtedly well supported by authority, and not disputed.

6. This proposition is not in the case. There can be no doubt that the plea to the jurisdiction supersedes an answer on the merits, to the extent that the plea must first be disposed of; but, having been disposed of adversely to the pleader, the answer on the merits will stand.

7. The defendant in error does not contend that the filing of the plea and motion to dismiss affected Manning's right to remove. The objections to Manning's contention are based on the removal papers and proceedings themselves, viz.: the defects in the petition and bond, and the "motion touching the removal" filed simultaneously therewith.

The case of Yule *vs.* Vose, 99 U. S., 539, arose under Act of 1866, and not under the Act of 1875; but even under the Act of 1886 Manning was too late when he ap-

plied for the removal at the trial. When he made that application, the trial of the cause had actually begun, and was in progress in the ordinary course of proceeding ; assuming, of course, that, as we contend, Manning's proceedings on December 29, 1884, designed to effect the removal, were null and void.

Respectfully submitted,

THEODORE F. H. MEYER,
For Defendant in Error,
32 Nassau Street,
New York City.

Office Supreme Court U. S.
FILED.
APR 16 1891
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

No. 303.

JEROME F. MANNING, PLAINTIFF IN ERROR,

vs.

HENRY AMY, DEFENDANT IN ERROR.

Plaintiff's Supplemental Brief-Filed by Permission of the Court.

1. Any informalities or defect in bond or petition may be waived, and are held as waived by the defendant, if not objected to in season, or the bond may be waived entirely by the defendant.

Ayers *v.* Watson, 113 U. S., 594.

R. R. Co. *v.* Hart, 114 U. S., 654.

Bonds, if really defective, can be amended.

113 U. S., 598.

2. The motion to dismiss and plea in abatement were exclusively the act of the *attorney of the defendant* in the superior court and not the act of *the defendant.*

The *defendant's acts* were the petition and bonds; statutory proceedings, and not to be defeated by the voluntary act of

the defendant's attorney on a mere matter of precedure, and pleading at *common law*.

3. Filing the petition and bond annihilated the jurisdiction of the State court, and each and every act of the State court thereafter were void and of no effect. 122 U. S., 513, and citations.

4. Plaintiff's admission (in error) as to jurisdictional facts, referred to on defendant's brief, p. 6, relate exclusively to the case as it stands in error in Supreme Court of the United States, and not as it formerly stood in the superior court, where the jurisdictional facts were contested by the plaintiff in that court and were passed on and there settled by that court.

5. The State court preceeding to try a case after removal papers filed, the party procuring the removal may contest the suit in the State court without waiving his right to question the jurisdiction in the U. S. Supreme Court.

Kanouse *v.* Martin, 15 How., 198.
Home Life Ins. Co. *v.* Dunn, 19 Wall, 214.
Meyer *v.* D. R. C. Co., 100 U. S., 457.
N. O. & C. M. R. R. Co. *v.* Miss., 102 U. S., 35.
Kerr *v.* Huidekoper, 103 U. S., 485.

6. Pleading to jurisdiction (by leave of court) in legal effect withdraws a plea to the merits.

103 U. S., 485.
N. S. Co. *v.* Tugman, 106 U. S., 118.

7. Filing the plea to the jurisdiction and motion to dismiss were not pleas to the merits, and being "special" did not legally affect defendant's right to remove.

Alley *v.* Nott, 111 U. S., 472.

Schaff *v.* Levy, 112 U. S., 711.

113 U. S., 742.

100 U. S., 473.

"The case must actually be *on trial by the Court*, all parties acting in good faith, before the right of removal is gone."

"But to bar the right of removal it must appear that *the trial had actually begun*, and was in *progress in the orderly course of* proceeding when application was made."

See page 474, Yulee *v.* Vose, 99 U. S., 539.

In the case at bar not even a hearing had been had on the plea and motion.

See especially p. 545, 99 U. S.

"The trial had not commenced, only preparations for trial."

"Yulee's counsel directed the attention of the Court to the petition for removal, etc."

"*After* hearing on the demurer it was too late to ask for a removal."

113 U. S., 746.

"The demurer going to the MERITS."

JEROME F. MANNING,
Plaintiff in Error.

APRIL 15, 1891.

Case argued orally, April 14, 1891.

Office Supreme Court U. S.
FILED,
APR 8 1891
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

JEROME F. MANNING, PLAINTIFF IN ERROR v.

HENRY AMY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.—ERRORS AND POINTS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

JEROME F. MANNING, PLAINTIFF IN ERROR v. HENRY AMY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.—ERRORS AND POINTS.

This was an action of contract in the Superior Court, County of Suffolk, Commonwealth of Massachusetts, upon certain alleged promissory notes, p.p. 5 and 6, Record. Defendant's ans. 13 and 16. There was special and general appearance for the defendant, 9 and 26.

The writ was dated Sept. 5, 1884, and returnable first Monday of Oct. 1884, 5 and 6 Defendant's ans. filed Dec. 26, 1884, by order of Court, 15 and 16.

December 29, 1884, defendant filed a petition and bond to remove the action to the Circuit Court of the United States for the District of Massachusetts, 17 and 18. Defendant filed a motion touching said removal, 16 and 17. The motion and petition to remove was ignored and disallowed by the Superior Court; the case went to trial in defendant's absence. Judgment was entered for the plaintiff and the case went, on exceptions, to the Supreme Judicial Court for the Commonwealth and were overruled, and the case, then, came to this Court on writ of error. There was a motion for new trial overruled, p. 27 and top 28 *specially*, and also second motion for new trial (3) based on finding of Judge Gardner in Holmes v. Manning, where one of the notes (of the series sued on) was adjudged usurious and void.

The exceptions (showing a history of the case) appear on page 29. The numerals ($500) should read $5000; as the declaration (5) shows the amount sued on was much in excess of $5000; and verdict on the cause of action was $27,239.14, top page 30. The plaintiff in the Superior Court was a citizen of New York; the defendant therein a citizen of Massachusetts. The petition to remove was supported by oath of the petitioner. Errors assigned appear on page 3, as follows:

And now comes the plaintiff in error and for an assignment of errors in the above-entitled cause assigns the following, viz:

First. It was error in the Superior Court to continue the case *nisi* on December 29th, 1884, for the purpose of giving that Court an opportunity to hear and determine the motion to dismiss and the plea in abatement, or for any other purpose, although the Court did so, expressly "reserving the defendant's right to remove."

Second. The plaintiff below being a citizen of New York, and the defendant a citizen of Massachusetts, and the matter in dispute, and for which the suit was brought exceeding the sum of five thousand dollars, exclusive of costs, and the defendant having during the return term filed a proper petition and a bond with sureties for the removal of the action to the Circuit Court of the United States for the District of Massachusetts, and all these facts appearing on record, the Superior Court had no lawful authority to proceed with the case after the filing of said petition and bond, unless and until the Circuit Court should remand the same as improperly removed.

Third. The jurisdiction of the Superior Court was at an end when the defendant's counsel, at the January sitting, 1886, called the Court's attention to the steps taken by him for the removal of the action to said Circuit Court and objected to a trial of the action in that Court (as stated in the bill of exceptions), and it was error in the Superior Court to rule "that the right to remove was waived," and to proceed to try the case in that Court, and this error is the more palpable from the fact that the defendant's right to remove had therefore been expressly reserved by that Court.

Amy *v.* Manning, 144, Massachusetts, 153.

1. There was no legal service of the writ on the principal defendant in the Superior Court. (p. 8 and 20).

2. The appearance (p. 9, 21,) of the principal ddefendant, J. F. Manning, by his counsel, being "*special*," entitled him to a hearing *in limine* (before any hearing on the merits) whether there was any legal service on him, and whether the "trustees" named in the writ should be charged or not as the garnishees.

3. The continuance (p. 18) in the Superior Court *subsequent* to the filing of bond and petition to remove, was *coram non judice* and void; its jurisdiction being annihilated by said filing.

4. Court erred in refusing to order "removal" when petition and bond therefor were filed.

5. The "general appearance," 26, was subsequent to filing petition and bond, when the case was, in law, removed, and no case, legally, to appear in.

6. This Court can consider any error appearing on or existing in the Record, although not assigned as error in the assignment of errors. Suydam v. Williamson, 20, How. 427.

There having been no service of the original writ on the principal defendant, and none attempted (as officers return, by its silence, shows); and the trustees having been discharged by the Court (be-

cause not chargeable as trustees, or garnishees), it cannot be said that there was any "*defective* or *insufficient* service" within the legal meaning of Sec. 84, Chap. 161, Public Statutes, Mass., and the pretended order of service and service thereon (p.p. 8, 9, 10, Record) were *coram non judice*, and the motion to dismiss (by reason of want of authority under said Sec. 84) should have been granted. Motion to dismiss filed Nov. 6, 1884. The answer in abatement (p. 13) setting up the same jurisdictional defenses, should have been sustained and the suit dismissed. *Plaintiff* filed a motion to dismiss defendant's motion and pleas; and an answer in abatement, p. 12, Sec. 84, Chap. 161, Public Statutes, reads:

SUPPLEMENTARY ~~FACTS~~ Process.

Section 84. "When the service of a writ, process, or order is defective or insufficient, the Court or tribunal to which the same is returnable may, upon the motion of the plaintiff or petitioner, issue further writs, processes and orders, to be served in such manner as may be therein directed; and upon due service thereof the Court or tribunal shall thereby acquire the same jurisdiction of the subject and of the parties as it would have obtained if such service had been made in pursuance and by virtue of the original writ, process or order. The action, suit or proceeding shall be continued from term to term, or time to time, until such service is had." This is not "*due process of law*" — *in the sense used in Art.* 14. *Amendments Con. U. S.*

ARGUMENT ON THE FACTS AND LAW.

The case presents a question of "*Removal*" from State to Federal Courts, under the Removal Acts. The case as presented on the the Record seems so plain and simple as to make an argument thereon (to a Court familiar with the law) a superfluity. The citizenship of the parties is admitted. There was and is no dispute about the jurisdictional facts. The petition and bond were proper, legal and sufficient.

The motion to dismiss and plea in abatement were filed Nov 6, 1884; some six weeks before the petition and bond to remove. They were based on the fact that no service of the plaintiff's writ was ever made on the defendant, and none ever attempted. The plaintiff's counsel relied on service of the writ on the alleged trustees as giving jurisdiction. But the trustees were thereafter discharged. Hence, no jurisdiction in the case attached. The defendant's appearance was *special* until long after the pleas to the jurisdiction should have been heard by the Superior Court. The contest on the merits, *thereafter*, was therefore no waiver of his pleas to the jurisdiction, and there was no case between these parties ever legally in the Superior Court. Harkness v. Hyde, 98, U. S. 476.

"Defendants right to remove," was reserved by the Superior Court.

The law applicable to the case is obvious as laid down in B. C. R. & N. Railway Co. v. Dunn 122, U. S. 513. Bottom page 515, cites Amy v. Manning 144, Mass. 153, and evidently disapproves of the opinion therein by the Supreme Judicial Court of Massachusetts.

The case in 122 is intended to announce the law in unmistakable terms: "That the record closes, so far as the question of removal is concerned, when the petition for removal is filed, and the necessary security furnished," p. 516, Id. The petition and bond in this case were filed and no question, technical or otherwise, was made against either. It is, then, obvious, and stating the case makes argument superfluous and unnecessary; that the Massachusetts Court erred in retaining its jurisdiction after the petition and bond were filed, and its judgment thereon and therein should be reversed and the cause thereto remanded.

The rest of the opinion on page 15, Id., in 122, U. S., is relied on and the cases therein cited. Stone v. South Carolina, 117, U. S., 430. Carson v. Dunham, 121, U. S., 421.

Carson v. Hyatt, 118, U. S., 279. In the light and law of these cases, it is manifest that the State Court erred in considering any of the questions of alleged waiver, or any other question arising ~~before~~ after the filing of the petition and bond, Dec. 29, 1884, by the defendant in the Superior Court; which filing was during the "return term." Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462. Miller v. Sunde (N. D.) 44 N. W. Rep. 301. Am. Finance Co. v. Bostwick 151, Mass. 19. Reynolds v. Adden 136. U. S. 348, 34 L. ed. 60.

In Amy v. Manning, p. 144, Mass. 156 and 157. The Law Court says: "The practice, we think, in this Commonwealth, under the St. of March 3, 1875, has been to hear and determine whether the case is *in fact* one that is removable under the statute.

Until, therefore, it has been clearly decided that a State Court cannot determine issues of fact arising upon a petition for removal, subject to the risk of having its final judgment reversed for error by the Supreme Court of the United States, we see no reason for changing our practice.

The Superior Court found as a fact that the parties were citizens of different States, as alleged in the petition, and also found and ruled that the right to remove the suit under the petition has been waived. ""

This Court in 122, U. S. 513, *ubi supra*, has so decided, and *that ends it.*

Respectfully submitted,

JEROME F. MANNING, Plaintiff in error *pro se.*

LOWELL, MASS., April 4, 1891.

Office Supreme Court U. S.
FILED.
APR 13 1891
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

JEROME F. MANNING,
Plaintiff in Error,

vs.

HENRY AMY,
Defendant in Error.

October Term,
1890.
Number 808.

Brief for Defendant in Error.

This case comes before this Court upon a writ of error, issued to the Superior Court of the Commonwealth of Massachusetts, for the County of Suffolk.

In his petition for the writ, which petition was addressed to one of the Justices of this Court, the plaintiff in error alleges that in the trial of this action, and in the rendition of the judgment therein, was involved the decision of a federal question, to wit, the construction of Section 639 of the Revised Statutes of the United States (Tr. rec., p. 1).

THE FACTS,

material to the issues that may arise in this Court on this writ, appear on the agreed record substantially as follows:

The action was commenced September 5, 1884, by Henry Amy, the plaintiff below and defendant in error here, against Jerome F. Manning, the principal defendant below and plaintiff in error here, and certain other parties who were supposed to have in their possession property belonging to the principal defendant, and who were therefore made parties as trustees of the principal defendant's goods, effects and credits.

The writ whereby the action was commenced in the Court below was returnable on the first Tuesday in October, 1884 (pp. 4, 5 and 6). On the return day, however, it appeared that Manning had not yet been served (pp. 7 and 8); while the writ had been served on several trustees (pp. 6, 7), whereupon the Court, pursuant to the powers and authorities conferred by the public statutes of Massachusetts, made an order directing personal service thereof to be made on Manning at least fourteen days before the fourth Tuesday in October, 1884 (p. 8), and such service was effected on Manning personally on October 9, 1884, at Boston, by a deputy sheriff, who made his return to that effect which was filed on October 10 (pp. 8 and 9).

On October 14, Charles Cowley entered his appearance for Manning specially, and on October 22, filed a motion to dismiss the action.

On November 6, 1884, Wilbur H. Powers likewise appeared for the defendant Manning specially, and filed a similar motion, and also a plea in abatement. Both the motion and the plea in abatement were founded upon substantially the same reasons, viz.: The allegation that the "writ" had not been personally served upon the defendant.

It appears by Manning's bill of exceptions in the Court below, p. 29, that thereafter, the defendant having been (on December 22, 1884) ordered by the Court to

file an answer, did so, on December 26, 1884. The answer appears on pages 13, 14, 15 and 16 of the record.

The action thereby became ready for trial, and could have been tried at the then current Term of the Court, to wit, the October Term, 1884.

At this stage of the proceedings, Manning filed, just before the final adjournment of the said October Term and on December 29, 1884, what he claims to be a petition and bond for the removal of the cause to the Circuit Court of the United States for the proper district. It will be noted that the bond which was presented upon that application (p. 18) was not acknowledged, and no justification of sureties was appended.

Simultaneously with filing this alleged petition and bond, Manning filed a paper entitled, "Defendant's Motion Touching the Removal of this Action." This paper is of such an extraordinary character that it is deemed proper to give it in full:

"SUFFOLK, ss.:

"SUPERIOR COURT, OCTOBER TERM, 1884.

"HENRY AMY

"*vs.*

"JEROME F. MANNING and Trus-
"tees.

"DEFENDANT'S MOTION TOUCHING THE RE-
"MOVAL OF THIS ACTION.

"And now comes the defendant specially, and

"suggests to the Court that he has heretofore "filed a motion to dismiss this action for causes "therein set forth, and also a plea in abatement "for causes therein set forth, but neither said mo- "tion nor said plea has yet been heard or deter- "mined by this Court, and the Court is about to "adjourn without day.

"He also suggests that he has herewith filed a "petition for the removal of this cause to the Cir- "cuit Court of the United States for the District "of Massachusetts, together with a suitable bond "therefore, *but that he has filed the same with- "out prejudice to said motion or said plea.*

"Wherefore, *in case said motion should not "be allowed, and in case said plea should not be "sustained, he prays the Court to order the re- "moval of this action*, as prayed for in said peti- "tion.

"JEROME F. MANNING.
"By his Attorney, WILBUR H. POWERS.

It appears that accordingly the case was continued *nisi* to the January Term, 1885 (the defendant reserving his right to remove ~~to~~ the cause (Rec., p. 18).

Manning's motion to dismiss and plea in abatement were thereafter brought to a hearing before the Superior Court, and heard on the 3d of March, 1885, and both the motion and the plea were overruled (p. 18), from which decision Manning appealed on March 10, 1885 (p. 25).

Thereafter and at the January Term, 1886, *i. e.*, more than a year after the filing of his so called petition and bond for removal, and nearly a year after the decision on Manning's motion to dismiss and plea, Wilbur H. Powers withdrew as attorney for Manning. The withdrawal was filed February 2, 1886, and about a

week later, to wit: on February 8, 1886, Charles Cowley appeared generally for Manning. The case came to trial a few days later, to wit: on or about February 11th, 1886, and after a full hearing was committed to a jury, which jury returned their verdict in favor of the plaintiff, and assessed damages in the sum of $27,958.38. The verdict was rendered on February 16th, 1886. Rec. p. 27

The defendant, on February 19, 1886, moved for a new trial. The motion was heard on the 8th of March, 1886, and allowed, unless the plaintiff remitted from the amount of the verdict $699.24. The plaintiff did so on the 9th of March, whereupon Manning's motion for a new trial was overruled (pp. 27 and 28).

Manning then alleged exceptions, which, after having been reduced to writing, were allowed on March 19 and filed March 24, 1886 (pp. 28/~~and~~ 30).

The questions of law raised by this bill of exceptions passed to the Supreme Judicial Court for the Commonwealth for revision, and the action was continued in the Superior Court from sitting to sitting to the January Term, 1887, when a rescript was sent from the Supreme Court to the Superior Court, directing the Clerk of the Superior Court, for the County of Suffolk, to make the following entry under the case in the docket of said Court: "Exceptions overruled" (p. 30).

The defendant thereafter made another motion for a new trial upon the ground of newly discovered evidence (p. 31).

This was heard on the 14th of May, 1887, and overruled (p. 36).

On May 23d, on plaintiff's motion, judgment was entered in favor of Amy, plaintiff, against Manning, defendant, for $29,335.37, damages and costs of suit, taxed at $95.22 (pp. 36 and 37).

Such are the proceedings and judgment that are brought up for review by this writ of error.

The plaintiff in error's assignment of errors are found on page 3 and in his brief.

It will be observed that so far as the errors assigned are concerned, they all go to the one point, that the jurisdiction of the Superior Court was ousted by the proceedings taken by or on behalf of the defendant Manning, on the 29th day of December, 1884.

Statement of the Question.

It appears from the record that the citizenship of the parties is admitted, and that there was and is no dispute about the jurisdictional facts, and the plaintiff in error admits this in his brief.

This feature of the case at bar takes it out of that line of decisions wherein this Court has held that the State Court has no power to try issues of fact which were made on the petition for removal.

The facts stated in Manning's petition being admitted to be true, the Superior Court of Massachusetts passed merely on the qestion of law whether it appeared on the face of the record, including the petition, the pleadings and the proceedings down to the time of filing the petition, that the petitioner was entitled to a removal.

This question the Superior Court had a right to determine.

Stone *vs.* So. Car., 117 U. S., 430, 432.
Carson *vs.* Hyatt, 118 U. S., 279.
B. C. R. & N. R. W. Co. *vs.* Dunn, 122 U. S., 513.

The inquiry is, therefore, narrowed down to the ques-

tion *whether Manning did remove the case*, his right to remove it by proper proceedings being admitted; or to state it differently, whether the Superior Court in the first instance correctly determined that question of law, and whether the Supreme Court was correct in affirming the Superior Court's decision on Manning's bill of exceptions.

It is submitted that both Courts decided correctly, and should be sustained, among others, for the following reasons.

POINTS.

I.

It is submitted that the assignment of errors must be read in connection with his petition for the writ of error, wherein he represents that the construction of section 639 of the Revised Statutes of the United States is involved. In other words, that he must be held to have taken his alleged removal proceedings under the provisions of that section, and must establish in this Court that he had the right to remove under that section, and that his proceedings were in conformity thereto. This will be found impossible, for that there is no provision in section 639 under which a defendant, who is a citizen of the State in whose Court the action is pending, can remove the cause from such Court to the Federal Court.

II

Not admitting that the plaintiff in error has, in view of the premises, any right and protesting that he should not be allowed, to attempt a justification of his proceedings under the act of Congress of March 3, 1875 (18 U. S. Stat. at Large, p. 470, Ch. 137). I shall proceed to show that under the last named act the proceedings taken by Manning were ineffectual to accomplish his object.

(*A.*) The petition and bond were defective.

An examination of the so-called petition (p. 17), will disclose the fact that he asked for the removal of the cause to the Circuit Court of the United States for the *First* District of Massachusetts, and an examination of the bond (p. 18) will show that it was conditioned that Mannnig enter the record and his appearance on the first day of the next session or term of the Circuit Court for the *First* District of Massachusetts. The bond concludes with the following words: "And pay all costs that may "be awarded, &c., then this *application to void* (*sic*); "otherwise to remain in full force and effect."

It is submitted that inasmuch as no Court existed or exists, known as the Circuit Court of the United States for the *First* District of Massachusetts these papers are defective in form and substance, and were void. Such a bond as that given could not have been lawfully approved, and if approved could not have been enforced against the sureties. That was a risk which neither the plaintiff below nor the Superior Court were bound to assume.

Further more under the statute the party applying for removal shall make and file a bond with good and sufficient sureties. There is nothing to show that the sureties were sufficient, there was no justifica-

tion, nor indeed any evidence that they ever executed the paper. These were matters on which the State Court had a right to be judicially satisfied. It is only when a petition in proper form and to proper effect for the removal of an action into the Circuit Court of the United States for the "proper" district, accompanied by a good bond, sufficient in form and substance, is filed that the State Court *is bound* to surrender jurisdiction.

It is perfectly evident that the papers did not comply with the statute and that the Court was right in subsequently ruling that as a matter of law they were insufficient to effect their ostensible purpose.

(*B.*) Though the papers had been in proper form, they were nullified by the disclaimer which accompanied their presentation to the Court above recited, to the effect that Manning did not desire the Court to relinquish jurisdiction, provided they should decide in his favor the motion and plea in abatement then pending, which he asked the Court to proceed to decide.

It is quite unnecessary to trouble the Court with any authorities upon the point that such speculations were never favored nor supported by this Court; it has been held that it is even too late, after an issue of law arising upon a demurrer has been decided by the State Court, to remove a cause to the Federal Court for the purpose of trying an issue of fact.

(*C.*) The defendant did not apply for an immediate removal at the term then about to expire, p. 16, but for a removal, subject to a condition, at a future term, for which the federal law makes no provision.

All the objections which he could have availed of in the State Court would have been available to him in the Circuit Court; nor would any such objection as Manning had presented have been waived by his appear-

ance in the Circuit Court, as these objections were shown on the face of the record, and were taken by answer or plea; however if the accompanying disclaimer nullified the entire proceeding, then the Courts below were right (irrespective of the defects in the so-called petition and bond) in retaining jurisdiction and in holding that Manning did not by his steps effect a removal.

(*D.*) In connection with this inquiry, it is proper to dispose of Manning's first assignment of errors upon still another ground.

The removal proceedings being thus defective and unsubstantial, the Court below committed no error when on Manning's own motion it continued the cause; but if it erred, Manning has no ground of complaint, because the error was committed on Manning's own motion. In granting that motion the Court merely did what Manning asked it to do.

III.

If Manning did not effect a removal of the cause at the October term, 1884, he could not thereafter effect it at all, for that was the term at which the cause could first be tried, according to the meaning of that phrase as construed by this Court in

Babbitt *vs.* Clark, 103 U. S., 606.
Pullman Palace Car Co. *vs.* Speck, 113 U. S., 84,

and, therefore, the State Court was correct in overruling his objection to its jurisdiction made at the time of the

trial. It was then too late for Manning to remove the cause.

It seems perfectly evident that the cause was not removed on the 29th December, 1884, because the defendant distinctly stated on the record that he did not wish then to remove it, and submitted to the State Court for its decision the questions raised by his motion and plea.

It is therefore obvious that at the time, the defendant did not intend to remove the cause to the Circuit Court and did not remove it.

The only other time when it is pretended that the cause was removed was when it came on for trial, and the defendant called the attention of the Court to the petition and bond for removal and the alleged reservation of the right to remove.

If it be claimed that the reservation by the Court of Manning's right to remove was binding on the Court and entitled Manning, at *any time thereafter*, to claim that right, it must be answered that this reservation was made without notice to or participation by Amy, and was not binding on him, and that there is nothing in the statute authorizing it.

IV.

If there be in law such a proceeding as the removal of a cause subject to condition subsequent, it was competent for Manning to waive his right to move upon the happening of the condition, and he did waive this right, *first*, by omitting to move after the adverse decision of his motion and plea (March 3, 1884), [p. 18.,] and *again* by a voluntary general appearance afterwards. This appearance was entered on February 8, 1886, more than

a year after the filing of his answer, and when no reason existed for appearing generally.

Even if everything else had been regular, this voluntary submission to the jurisdiction of the State Court appearing on the face of the record, presents a conclusive answer to his attempt to remove and the claims based thereon.

A party who desires to remove cannot retain his right of removal whilst voluntarily submitting himself to the jurisdiction of the State Court. He will not be allowed to experiment on the decision of the Court.

Removal Cases, 100 U. S., 457–473.
Hanover National Bank *vs.* Smith, 13 Blatchf., 224.

It is claimed that this Court in Burlington, &c., Railway *vs.* Dunn, 122 U. S., 513, disapproved of the opinion of the Supreme Court of Massachusetts in this case, on the ground that a State Court has no right to entertain a cause after the filing of the petition and bond for removal, for the purpose of deciding whether the facts existed upon which the right of removal depends, but in this case the record conclusively shows that the Courts in Massachusetts *did not pass upon any issue of fact* arising upon the petition for removal (there was, in fact none to pass upon), but merely upon the questions of law that arose upon the record as it stood at the time. The decision of the Supreme Court was right notwithstanding some unguarded expressions in the opinion may not, in all respects, meet with the approval of this Court.

V.

Regarding the suggestion in plaintiff's brief, that the Superior Court had not lawfully acquired jurisdiction over his person, and the statement in this connection that no service on Manning of the writ was ever made or attempted; and the vague assertion that the supplementary process authorized and provided for by the public statutes of Massachusetts was, under the circumstances, not due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States; it is submitted, that it does not appear by the record that this question has been raised and decided in the Courts below; it is now presented for the first time, without even an assignment of error to support it; and that this Court, will not pass upon any "federal question" that was not passed on by the Court below, nor necessarily involved in its decision; at all events the point is unfounded for the record shows that Manning was personally served (see the Sheriff's return on page 8), and there is nothing in the record to show that Manning ever disputed the correctness of that return, or took issue thereon. True it is, though, that the return does not pretend to show service of "*the writ*," but it does show service on Manning of the *order of the Court which took the place of the writ* (p. 8), which had spent its force at the time when its substitute, the *order*, was issued.

The Court had the power, irrespective of any statute, to issue an alias, or in some other form renew the writ until its purposes had been accomplished. The statute (Publ. Stats. Mass., Chap. 161, § 84), only confirmed that inherent power, and perhaps extended it, to enable the Court to determine the form and prescribe the manner of service.

In other words, Manning had notice and an op-

portunity to be heard, or to use the language of this Court in Arrowsmith *vs.* Harmoning, 118 U. S., 194, he had the "necessary constitutional protection."

Whether the paper be called a *writ*, a summons, a subpœna, an order to show cause, warrant or notice, as long as it embodies the element of notice and an opportunity to be heard, it is *due process*, and service of such a paper was effected on Manning, and was held by the highest Court of the State of Massachusetts to have been sufficient to give the Superior Court jurisdiction.

Walker *vs.* Sauvinet, 92 U. S., 90.

It has been the custom of this Court to follow the decisions of the highest Court of the State on a question of this character. The service, whatever it was, was good under the laws of Massachusetts, and that it was due process of law cannot be doubted.

The principles laid down in Arrowsmith *vs.* Harmoning, *supra*, would seem to be in point on this question.

VI.

The so-called petition and bond for removal were filed December 29, 1884. The next session of the Circuit Court for the proper district commenced in May, 1885. When Manning, nine months later and in February, 1886, at the trial of this cause, made his objection to the jurisdiction of the Superior Court, that term had passed; if he still claimed the extraordinary privilege of removal upon condition; it devolved on him to produce at least proof that he had definitely made up his mind and had on his part performed the duties enjoined upon him by

the statute; that is, had filed a copy of the record and entered his appearance in the Federal Court, this he failed to do. If such proof had been produced, and an actual removal ~~effected~~, it might have been error in the State Court to proceed till the cause was remanded; but in the absence of any such proofs, the Court was not warranted in entertaining Manning's objection, inasmuch as the bond was no longer operative, assuming that it ever had been, and thereby a new defect arose in his proceedings which rendered the attempt to remove ineffectual. Moreover, had the Superior Court relinquished jurisdiction at that time, the plaintiff below might have been turned out of Court altogether, without any means of compelling Manning to proceed in the Circuit Court, and without any guarantee whatever (not even the slender security provided for by the statute) that Manning would ever voluntarily proceed in that Court. in this action

had been shown

VII.

The record makes it clear that Manning's proceedings in respect to removal were merely an attempt to use the jurisdiction of the United States Courts and the privileges conferred by the act of 1875 for the purpose of hindering and delaying his creditor in the collection of a debt which a jury of his own State has found to be justly due, and this Court will not aid him to defeat justice by the abuse of procedure, or to reap advantage from his own wrong, and gather benefits from his own errors and irregularities.

The decisions of the Massachusetts Courts were correct,

the judgment should be affirmed, and the usual allowance for delay should be awarded to the defendant in error, in view of the frivolous character of this appeal.

All of which is respectfully submitted.

THEODORE F. H. MEYER,
For defendant in error,
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New York City.